Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

No. 97-828

In The

Supreme Court of the United States

October Term, 1997

EXCALIBUR GROUP, INC., a Minnesota corporation,

Petitioner,

vs.

CITY OF MINNEAPOLIS, a Municipal corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LARRY L. WARREN
Counsel of Record
JAY M. HEFFERN
JAMES A. MOORE
CAROLINE M. BACHUN
Attorneys for Respondent
300 Metropolitan Centre
333 South Seventh Street
Minneapolis, Minnesota 55402-2487
(612) 673-2063

72713 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

1. Where the City properly finds that regulated, adults-only uses cause adverse secondary effects, has the City demonstrated a substantial government interest sufficient to sustain a scheme of content-neutral, time, place and manner regulations addressing those effects, or, as Petitioner argues, must each element of the scheme be independently subjected to judicial scrutiny as to the degree to which the measures actually remedy identifiable effects?

2. Is the merchandise display provision of Minneapolis Code of Ordinances, § 540.410(g)(3) overbroad?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	7
I. Section 540.410(g)(4) Is A Constitutional, Content-Neutral Time, Place, And Manner Regulation Enacted To Minimize The Secondary Effects Of Adult Uses.	9
A. Section 540.410(g)(4) is a content-neutral regulation.	9
B. Section 540.410(g)(4) serves a substantial government interest and allows for reasonable alternative avenues of communication.	11
II. Section 540.410(g)(3) Of The Minneapolis Code Of Ordinances Is Not Unconstitutionally Overbroad.	15
Conclusion	23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Alexander v. City of Minneapolis, 928 F.2d 278 (8th Cir. 1991) 6, 10, 11, 12

Broadrick v. Oklahoma, 413 U.S. 601, 93 S. Ct. 2908 (1973) 15

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) 21

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925 (1986) 9, 10, 11, 13, 14

Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268 (1975) 17, 18

44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996) 7, 8, 12, 21

Garner v. White, 726 F.2d 1274 (8th Cir. 1984) 21

New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348 (1982) 15

New York Times, Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 698 (1964) 19, 20

Contents

Page

Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1960) 19, 20

State v. Holmberg, 545 N.W. 2d 65 (Minn. Ct. App. 1996) 2, 22

Upper Midwest Booksellers Assoc. v. City of Minneapolis, 780 F.2d 1389 (8th Cir. 1985) 16, 17

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) 21

Young v. American Mini Theatres, 427 U.S. 50, 96 S. Ct. 2440 (1976) 10, 13, 16

Statutes Cited:

Minneapolis Codes of Ordinances:

§ 385.131 16

§ 540.410 ..... 1, 4, 6, 8, 11

§ 540.410(a) 3, 6, 10

§ 540.410(b)(1) 3

§ 540.410(c) 6

§ 540.410(g) 2, 3, 6, 7, 9, 14

Contents

Page

§ 540.410(g)(3) ..... i, 1, 2, 4, 15, 16, 17, 18, 19, 20

§ 540.410(g)(4) 1, 2, 4, 9, 11

STATEMENT OF THE CASE

Petitioner, Excalibur Group Inc., owns and operates an adults-only bookstore, known a "Sex World", in the City of Minneapolis. Petitioner acknowledges that Sex World is subject to the provisions of the adult uses zoning ordinance of the City, Minneapolis Code of Ordinances § 540.410. Moreover, Petitioner does not challenge in this action the City's findings that regulated uses under the ordinance cause adverse secondary effects. Nevertheless, Petitioner brings a facial and as-applied challenge to the constitutionality of certain subsections of that ordinance. Specifically, Petitioner contends that § 540.410(g)(3) is overbroad and that the sign restrictions of § 540.410(g)(4) violate the First and Fourteenth Amendments of the United States Constitution.

In a letter dated March 10, 1994, Stephen Poor, Zoning Inspector for the City, gave notice to Petitioner that it was in violation of § 540.410(g)(4), which prohibits signs in windows of adults-only bookstores. Petitioner was advised to comply with the Section by removing the window signs on or before March 24, 1994. The Zoning Inspector sent a second letter to Petitioner dated May 5, 1994. In this second letter, the Zoning Inspector again advised Petitioner to remove the signs from windows. He also advised Petitioner that the display case containing adult sexual paraphernalia was visible from the street and was in violation of § 540.410(g)(3). Petitioner was given until May 16, 1994 to comply with §§ 540.410(g)(3) and 540.410(g)(4).

In April 1994, in response to the Zoning Inspector's March letter, Petitioner commenced a declaratory judgment action in the United States District Court. In its Complaint, Petitioner requested, *inter alia*, that the District Court declare Minneapolis Code of Ordinances, § 540.410(g)(4) facially unconstitutional and unconstitutional as applied to Petitioner. Petitioner sought

a temporary and permanent injunction against enforcement of the ordinance. Petitioner's Motion for Preliminary Injunction and Temporary Restraining Order, sought, in relevant part, to restrain and enjoin the City from enforcing the provisions of Section 540.410(g)(4) of the Minneapolis Code of Ordinances. This motion came on for hearing before the Honorable Michael J. Davis on April 13, 1994 and a Memorandum Opinion and Order was issued on April 19, 1994 which denied the motion. In its opinion, the District Court found that Plaintiff was unlikely to succeed on the merits of its First Amendment claims.

After the denial of Petitioner's motion, criminal charges were brought in state court against Dennis Buchanan, d/b/a Excalibur. In the meantime, the City brought a motion for summary judgment before the United States District Court on the declaratory judgment action. On December 11, 1995, the District Court issued a Memorandum Opinion and Order which granted the City's motion for summary judgment and disposed of all issues. Petitioner appealed the District Court's ruling to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit affirmed the District Court by opinion filed June 24, 1997. Petitioner's Petition for Rehearing, with Suggestion for Rehearing En Banc was denied by the Eighth Circuit on August 20, 1997.

In the parallel criminal case, Dennis Buchanan, d/b/a Excalibur, was found guilty in state court of violating §§ 540.410(g)(3) and 540.410(g)(4). The conviction was affirmed by the Minnesota Court of Appeals in its decision in *State v. Holmberg*, 545 N.W. 2d 65 (Minn. Ct. App. 1996). In its opinion, the Minnesota Court of Appeals held that the Minneapolis Code of Ordinances, § 540.410(g) is a constitutionally valid restriction on the time, place, and manner of speech that is not impermissibly overbroad.

The Minneapolis Code of Ordinances, § 540.410(g), which is at issue in the instant case, provides, in relevant part:

> All new regulated uses, and all existing regulated uses by December 1, 1988, shall comply with the following sign requirements:
>
> * * *
>
> (3) No merchandise or pictures of the products or entertainment on the premises shall be displayed in the window area or any area where they can be viewed from the sidewalk in front of the building.
>
> (4) Window areas shall not be covered or made opaque in any way. No signs shall be placed in any window. A one square foot sign may be placed on the door to state hours of operation and admittance to adults only.

"Regulated uses," as enumerated in § 540.410(a), include adults-only bookstores, adults-only motion picture theatres, adult entertainment centers, massage parlors, rap parlors, and saunas. Petitioner admits that it is an adults-only bookstore as defined by § 540.410(b)(1). Section 540.410(b)(1) defines an adults-only bookstore as follows:

> [A]n establishment having as a substantial or significant portion of its stock in trade, books, magazines, films for sale or viewing on premises by use of motion picture devices or other coin-operated means, and other periodicals which are distinguished or characterized by their principal emphasis on matters depicting, describing or relating to nudity, sexual conduct, sexual excitement or

> sadomasochistic abuse, as defined below, or an establishment with a segment or section devoted to the sale or display of such material for sale to patrons therein.

Petitioner acknowledges that, as an adults-only bookstore, Petitioner is subject to the merchandise display and window sign restrictions of Sections 540.410(g)(3) and 540.410(g)(4). Petitioner questions whether the ordinance provisions at issue actually minimizes identifiable secondary effects of "regulated uses." A review of the legislative history demonstrates that the ordinance was enacted only after extensive empirical study of the impact of adults-only bookstores and other "regulated uses" on surrounding areas.

The legislative history of the ordinance reveals that the ordinance was the subject of repeated public hearings during which the City Council, individual citizens, community leaders, community organizations, and local business owners were able to voice their concerns regarding the implications of the ordinance. In addition to considering public opinions, the City researched the issue and obtained various studies of other cities with similar problems to determine what solutions had been successfully used in those cities. Guided by the empirical studies of those cities, the Planning Department Staff ("Staff") submitted to the Minneapolis City Planning Commission a well-reasoned memorandum regarding the regulation of adult uses. The City Planning Commission, in turn, presented the findings and recommendations in the memorandum to the Standing Committee on Zoning and Planning.

In the Staff memorandum, the Staff articulated that the purpose of the regulations of § 540.410 is to "control the adverse impacts on residentially zoned areas and the City's fragile strip and neighborhood commercial areas." In determining the

purpose of the regulations, the Staff relied upon studies of other cities, including studies of Seattle, Chicago, Los Angeles, Indianapolis, and Portland, Oregon.

In reviewing these various studies, the Staff found that the Indianapolis report appeared to present findings similar to those in the other studies. The Indianapolis study compared study areas (areas around adult businesses) with control areas (similar areas, but with no adult businesses). In comparing the study areas with the control areas, the following observations were found:

1. Major crime was 23 per cent higher in the study areas.

2. Sex related crimes were almost twice as high in the study areas.

3. Crime was actually higher in the residential areas near the adult businesses than it was in the commercial areas.

4. Housing values in the study area appreciated at only one-half of the rate of the control areas.

5. Property turnover was substantially higher in the study areas; twice as many homes were placed on the market at substantially lower prices than would be expected had the study area's market performance been typical for the period of time in question.

6. Results from a national survey of real estate appraisers demonstrated that the adverse affect on property values was greater for residential properties than for commercial properties.

7. The survey also showed that 50 percent of the appraisers felt that there would be substantial-to-moderate negative impact on property values. However, 30 percent saw little or no impact and 20 percent saw the affect as being dependent on other factors in the area, such as development standards imposed on the use and the ability of the commercial area to buffer the impact from other uses.

Based upon the above Indianapolis study findings, the Staff determined that the Downtown area of Minneapolis is best able to "buffer" the impact of adult uses on surrounding properties. The Staff further found that to more effectively minimize the adverse impacts of adult uses on surrounding areas, design controls, which would control the appearance and image of adult businesses, should be implemented. To further this purpose of minimizing adverse impacts, the Staff proposed that subsection (g) be added to § 540.410 as a regulation of signs and merchandise displays. *Id.* In sum, based upon the findings of the Indianapolis study, the Staff recommended a regulatory scheme consisting of two primary means to minimize the adverse impacts of adult uses on surrounding areas. The first means is the enactment of locational restrictions which require that all adult uses be located within the B-4 Central Business District. *See* Section 540.410(c). The second means is the enactment of sign and product display requirements to control the appearance and image of adult uses. *See* Section 540.410(g). The locational restrictions requirement has been challenged as unconstitutional in the Eight Circuit Court of Appeals and has been held to be a content-neutral time, place and manner restriction which was enacted to minimize the adverse secondary effects of "regulated uses" as defined by Minneapolis Code of Ordinances, § 540.410(a). *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991). Petitioner has not challenged the findings of secondary effects. Instead, the instant Petition challenges the

signage and product display requirements of the ordinance on the grounds that they have not been demonstrated to actually address identified secondary effects. Petitioner also challenges the product display requirements as overbroad.

REASONS FOR DENYING THE WRIT

The United States Court of Appeals for the Eighth Circuit properly applied the law in determining that Minneapolis Code of Ordinances, § 540.410(g) is a valid content-neutral time, place and manner regulation which was enacted to minimize the adverse secondary effects of adult uses on surrounding areas. Petitioner argues that this Court's decision in *44 Liquormart, Inc. v.. Rhode Island*, 116 S. Ct. 1495 (1996), nullifies existing precedent and presages a new era of judicial activism in the regulation of secondary effects caused by adults-only businesses. Petitioner's extension of *44 Liquormart* to time, place and manner regulations, such as the one in question here, is premised upon the flawed conclusion that regulatory bans on categories of commercial speech are wholly analogous to regulation of secondary effects through time, place and manner regulations. In fact, *44 Liquormart* has no application to the present case.

44 Liquormart involved a ban on liquor price advertising in the State of Rhode Island. This admittedly onerous limitation was purportedly justified by the State's interest in promoting temperance. While the State's interest was substantial, this Court found that the State failed to show that the interest justified the drastic measure of a ban on the truthful, nonmisleading commercial speech involved. A plurality of this Court noted that

> [s]ound reasons justify reviewing [this] type of commercial speech regulation more carefully. Most obviously, complete speech bans, *unlike content-*

> *neutral restrictions on the time place, or manner of expression*, . . . are particularly dangerous because they all but foreclose alternative means of disseminating certain information.

116 S. Ct. at 1507 (citations omitted) (emphasis added). Because *44 Liquormart* involved a complete ban on speech, this Court determined that the State had the burden to establish that the challenged regulation significantly advanced the State's interest.

In the instant case, the challenged ordinances do not operate to ban speech; they accommodate it. They represent a legislative judgment as to how to address the documented effects of the regulated, but permitted, uses. As this Court recognized in *44 Liquormart*, the burden upon the City to justify such time, place and manner speech restrictions is less onerous than in cases where speech is banned completely.

Here, the serious secondary effects are not disputed. Only the legislative wisdom of the means of accommodating the speech in the community is called into question. The challenged regulation is not aimed at the *speech* disseminated by adults-only business. Rather, the regulation in question is aimed at the *secondary affects* adults-only businesses have on the surrounding business and residential community. Because there is no definitively correct way to mitigate secondary effects of adults-only businesses, regulation is uniquely suited to legislative initiative.

Section 540.410 was enacted only after the City reviewed studies from various municipalities regarding the impact that adult businesses have on property values. Relying on empirical studies of other cities with similar problems, the City decided to locate all adult uses in the B-4 Central Business District to protect residential property values. The City also enacted

§ 540.410(g), which regulates the size and location of signs and the display of merchandise, to further mitigate the secondary adverse effects on commercial properties in the B-4 Central Business District. In so doing, the City seized upon this Court's invitation to experiment with remedies for the admittedly serious secondary effects presented by adult uses.

The City's sign and merchandise display regulations of adult uses are minimal restrictions designed to serve the substantial government interest of minimizing the adverse secondary effects of adult uses on surrounding properties. Petitioner does not challenge the existence of these secondary effects generally, nor the substantiality of the governmental interest in their regulation. Instead, Petitioner challenges the efficacy of the legislative means by which these effects are to be addressed. Petitioner would have the courts substitute their judgment for that of the city council in determining which specific aspects of the time, place and manner of conducting adults-only business should be regulated, and to what extent. The Eighth Circuit declined Petitioner's invitation. This Court should too.

I.

SECTION 540.410(g)(4) IS A CONSTITUTIONAL, CONTENT-NEUTRAL TIME, PLACE, AND MANNER REGULATION ENACTED TO MINIMIZE THE SECONDARY EFFECTS OF ADULT USES.

A. Section 540.410(g)(4) is a content-neutral regulation.

A valid time, place and manner regulation must be content-neutral, serve a substantial government interest and may not unreasonably limit alternative avenues of communication. *City*

of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925 (1986). An ordinance may be content-neutral even though it discriminates among different types of expression, as long as the ordinance is aimed not at the expressive content, but rather aimed at the secondary effects of adult uses on the surrounding area. *Renton*, 475 U.S. at 48, 106 S. Ct. at 929; *See also Young v. American Mini Theatres*, 427 U.S. 50, 96 S. Ct. 2440 (1976) (holding that the content of erotic movies may be used as a basis for placing such movies in a different classification than other motion pictures).

In the instant case, the ordinance does not ban adult uses or the sale of merchandise of adult uses. The purpose of the ordinance at issue, as enumerated above, is to insure that the adverse effects of adult uses do not contribute to the blighting or downgrading of the surrounding neighborhood. Section 540.410(a). This purpose has already been scrutinized and has been held to be a content-neutral rationale for the regulation of the time, place, and manner of speech. *Alexander v. City of Minneapolis*, 928 F.2d 278, 282-83 (8th Cir. 1991).

The Minneapolis ordinance is similar in purpose and content to the ordinance reviewed by the United States Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). The *Renton* Court found that:

> The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally "protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life," not to suppress the expression of unpopular views.

Renton, 475 U.S. at 48, 106 S. Ct. at 929.

The *Renton* Court held that the Renton ordinance was "content-neutral" because the regulations were justified without reference to the content of the speech. *Id.* The Court further held that the Renton ordinance represented a valid governmental response to the admittedly serious problems created by adult theatres. *Renton*, 475 U.S. at 53, 106 S. Ct. at 932.

Similarly, the enactment of § 540.410 represents a valid governmental response to the adverse affects associated with adult uses. The Minneapolis ordinance was enacted to "control the adverse impacts on residentially zoned areas and the City's fragile strip and neighborhood commercial areas." The Minneapolis ordinance was enacted for a purpose similar to the purpose of the Renton ordinance. Therefore, the Minneapolis ordinance should similarly be held to be a content-neutral ordinance.

B. Section 540.410(g)(4) serves a substantial government interest and allows for reasonable alternative avenues of communication.

Having decided that the Renton ordinance was a content-neutral time, place and manner regulation, the Supreme Court applied a two part test of permissibility. *Renton*, 475. U.S. at 50, 106 S. Ct. at 930. To be a valid content-neutral time, place and manner restriction, the ordinance must; (1) be designed to serve a substantial governmental interest; and (2) allow for reasonable alternative avenues of communication. *Id.*

In *Alexander v. City of Minneapolis, supra*, the Eighth Circuit Court of Appeals reviewed the locational requirements of the Minneapolis ordinance at issue against the two part *Renton* test and found the ordinance to be constitutional. That court determined that the stated purpose of the ordinance — insuring that the adverse effects of adult entertainment businesses would

not contribute to the downgrading of surrounding properties — was a substantial government interest. Further, the court determined that the ordinance allowed for reasonable alternative avenues of communication, even though it restricted the number of areas where the adult businesses may locate. These findings are not challenged in the instant case.

The City Council recognized that even though the locational requirements would protect the residential districts of the City from the secondary effects, those effects would not disappear simply because the adult businesses were moved to the B-4 Central Business District of Minneapolis. Minimal restrictions on signs and merchandise displays were therefore enacted as part of the broader regulatory scheme to protect the commercial areas from the secondary effects of adult businesses. The City has a substantial interest in protecting its commercial and residential property owners from the adverse impacts of adult uses.

In addition to serving a substantial government interest, the minimal restrictions on the appearance of a building's windows and signs and on the merchandise displays do not restrict reasonable avenues of alternative communication. In *Alexander*, the Court approved considerable restriction upon location as providing reasonable alternative avenues of communication. In contrast, the Minneapolis regulation of signs and merchandise displays places little or no restriction on avenues of communication. Signs which cannot be placed in windows may be alternatively placed on the walls. Merchandise may continue to be displayed for view within the confines of the establishments.

Petitioner argues that each element of the regulatory scheme is subject to independent scrutiny under *44 Liquormart*. Petitioner argues that there is no empirical evidence which

establishes that a substantial government interest is served by regulating the image of adult-only businesses through sign restrictions. These empirical evidence concerns were addressed in *Renton* and *American Mini Theatres*, *supra*. In *Renton*, the Supreme Court stated:

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here. Nor is our holding affected by the fact that Seattle ultimately chose a different method of adult theater zoning than that chosen by Renton, since Seattle's choice of a different remedy to combat the secondary effects of adult theatres does not call into question either Seattle's identification of those secondary effects or the relevance of Seattle's experience to Renton.

Renton, 475 U.S. at 51-52, 106 S. Ct. at 931.

The *Renton* Court referred to the discussion in *American Mini Theatres* regarding the decisions of some municipalities in choosing to disburse adult uses while other municipalities choose to concentrate the adult businesses. The *Renton* Court concluded that it was not appropriate for the court to appraise the wisdom of those municipal decisions. The court simply said that municipalities "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Renton*, 475 U.S. at 52, 106 S. Ct. at 931 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. at 71, 96 S. Ct. at 2453).

Petitioner's empirical evidence issue was properly rejected by the courts below. The District Court ruled:

> [T]here is evidence from the Indianapolis study that such businesses negatively effect [sic] property values and that development standards may control such effects. In this case, Defendant has chosen to address this problem by regulating the image of the adult-only businesses. It is not the function of the courts to appraise the wisdom of the city's choice of solutions for serious problems. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 71 (1976). "Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.*; *South Suburban Housing Center*, 935 F.2d at 897.

Petitioner's Appendix at A39-A40. The District Court noted that, as in *Renton*, the city was entitled to rely on studies and experiences of other cities when enacting its adult use ordinance and ruled that the sign requirement cannot be analyzed in a vacuum and legislative history and case law must be analyzed.

The District Court properly found that the City had evidence before it, when enacting Section 540.410(g), which demonstrated that adults-only businesses affect property values and that development standards may control such effects. The Court further held that

> the sign requirements offer reasonable alternative avenues of communication. Although the ordinance prohibits window signs, wall signs are allowed. The size of wall signs are regulated, the contents of the signs are not. Therefore Plaintiffs [sic] have the opportunity to advertise how they choose, within a specified space.

Petitioner's Appendix at A40.

To minimize the adverse effects of adult uses, the City has chosen minimal restrictions on the location of the uses, size and location of signs, and on the display of merchandise. Although the business owner must not display merchandise which could be seen from the sidewalk, it will take very little consideration for that owner to determine how to comply with the ordinance. The ordinance does not require that a building have windows, only that those windows which exist not be opaque. Further, the ordinance does not specify how windows may be decorated so long as the decoration is otherwise lawful. Further, the restrictions on the signs allow sizable commercial signs on each street face of the building. Petitioner's Appendix at A64. Therefore, the ordinance is a very minimal restriction which allows full communication of the business intent of Petitioner.

II.

SECTION 540.410(g)(3) OF THE MINNEAPOLIS CODE OF ORDINANCES IS NOT UNCONSTITUTIONALLY OVERBROAD.

The restrictions of § 540.410(g)(3) are not unconstitutionally overbroad. Overbroad restrictions of expression are unconstitutional. *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 3361 (1982). The overbreadth doctrine is "strong medicine" and should be employed only "with hesitation, and then 'only as a last resort'." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973).

Overbreadth must be "real and substantial" to make it susceptible to invalidation. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). A statute must substantially affect constitutionally protected speech to trigger the overbreadth doctrine. *Ferber*, 458 U.S. at 773. In addition, the uninhibited exhibition of material

that is on the borderline between pornography and artistic expression is given less protection than the free dissemination of ideas of social and political significance. *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 61 (1976).

Section 540.410(g)(3), which regulates merchandise displays, may not be invalidated on the basis of overbreadth. The ordinance does not substantially affect constitutionally protected speech. The ordinance merely places minimal restrictions on the display of merchandise. Pursuant to the ordinance, merchandise cannot be placed where it can be viewed from the sidewalk in front of the building. However, the ordinance does not prohibit Petitioner from selling the merchandise or displaying the merchandise for viewing within the bookstore.

In an Eighth Circuit Court of Appeals case, Minneapolis Code of Ordinances, § 385.131 was upheld against a constitutional overbreadth challenge. *Upper Midwest Booksellers Assoc. v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). Subsection 6 of that ordinance made it unlawful for any person to knowingly display for commercial purposes any material that is harmful to minors unless the material is in a sealed wrapper. *Id.* at 1390. Because the sealed wrapper requirement prevented either adults or minors from scanning the material prior to purchase, the *Upper Midwest* court found that the ordinance restrictions had only an incidental effect on the First Amendment rights of adults. *Id.* at 1395. The court further found that the ordinance did not unduly burden the First Amendment rights of adults because, *inter alia*, "adults are still able to view any of the material in a free and unfettered fashion by purchasing it." *Id.*

In the instant case, the display of merchandise is restricted in that an individual desiring to purchase the merchandise cannot

view the merchandise until the individual physically enters the bookstore. Within the bookstore, there are no restrictions on the placement of merchandise and an individual is free to view any and all merchandise within the store. Therefore, unlike the sealed wrapper restriction in *Upper Midwest*, *supra*, under § 540.410(g)(3), an individual may actually view the merchandise prior to purchasing it. Clearly, § 540.410(g)(3) is a less restrictive ordinance than the one upheld against constitutional challenges in *Upper Midwest*.

In challenging § 540.410(g)(3) as being unconstitutionally overbroad, Petitioner relies heavily upon *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268 (1975). In *Erznoznik*, a Jacksonville ordinance completely proscribed any showing of nudity, however innocent or educational, on drive-in theater screens which were visible from a public street or place. The court in *Erznoznik* held that the ordinance was overbroad because the ordinance censored the content of otherwise protected speech. In support of its holding that the Jacksonville ordinance was overbroad, the Court held:

> The ordinance is not directed against sexually explicit nudity, nor is it otherwise limited. Rather, it sweepingly forbids display of all films containing *any* uncovered buttocks or breasts, irrespective of context or pervasiveness. Thus it would bar a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach.

Erznoznik, 422 U.S. at 213.

Erznoznik is clearly distinguishable from the instant case.

In *Erznoznik*, the Jacksonville ordinance was content-based because it completely banned the showing of films depending on the content of the films. In contrast, the Minneapolis ordinance does not ban adult bookstores or other adult uses based on the merchandise found within those businesses. Instead, the Minneapolis ordinance allows these adult uses to exist. The ordinance only regulates the presentation of these uses to minimize the adverse secondary effects on surrounding areas.

Further, the Jacksonville ordinance substantially affects constitutional speech because compliance with the ordinance would potentially prohibit the viewing of a baby's buttocks, artistic nudity, and educational programs of other cultures. In stark contrast, the Minneapolis ordinance does not substantially affect constitutionally protected speech. The ordinance solely places minimal restrictions on the display of merchandise. Because the Minneapolis ordinance is content-neutral and does not substantially affect constitutionally protected speech, the Minneapolis ordinance is not unconstitutionally overbroad.

Petitioner argues that § 540.410(g)(3) of the Minneapolis Code of Ordinances is overbroad because it unconstitutionally infringes upon non-obscene, non-commercial speech. Minneapolis Code of Ordinances, § 540.410(g)(3) provides:

> (3) No merchandise or pictures of the products or entertainment on the premises shall be displayed in the window areas or any area where they can be viewed from the sidewalk in front of the building.

Petitioner argues that the Eighth Circuit erred in concluding that the ordinance has been subjected to a narrowing construction by the state courts. Petitioner further argues that the Eighth Circuit's reliance on the "commercial speech" doctrine was improper and is grounds for granting the petition. These arguments are without merit.

Petitioner argues that the restriction of subsection (g)(3) is not one directed to "commercial" speech. Petitioner contends that the subsection focuses not on speech which proposes a commercial transaction, but upon the fact that the books, magazines, and video-tapes might be displayed publicly for sale. Petitioner cites *New York Times, Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 698 (1964); and *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1960) in support of this argument.

Both cases cited by Petitioner are distinguishable from the instant case. *New York Times* involved the newspaper publication of an editorial advertisement communicating information, expressing opinion, reciting grievances, protesting claimed abuses, and seeking financial support on behalf of the Negro right-to-vote movement and the Negro student movement. *New York Times*, 376 U.S. at 256-57, 84 S. Ct. at 713.

In *New York Times, supra,* the publication at issue was not a commercial advertisement because it communicated information, expressed opinion, related grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives were matters of the highest public interest and concern. In the instant case, the expression or speech involved is the display of merchandise. This display is purely commercial in nature. The display is the presentation of products, which proposes a commercial transaction of a sale of the products for a monetary price. The display is not communicated in conjunction with expressed opinions, recited grievances, protested claimed abuses, or the request for financial support, as was the case in *New York Times.*

Smith, supra, involved a Los Angeles City ordinance which made it unlawful "for any person to have in his possession any obscene or indecent writing, (or) book . . . in any place of

business where . . . books . . . are sold or kept for sale." *Smith*, 361 U.S. at 148, 80 S. Ct. at 216. An owner of a bookstore was convicted pursuant to this Los Angeles ordinance because he allowed an obscene book to be placed on a shelf in his bookstore. *Id.*, 361 U.S. at 149, 80 S. Ct. at 216. This conviction was based solely on the bookstore owner's possession of the obscene material, and did not require an element of scienter by the owner; the owner's knowledge of the contents of the book was not required for conviction of the owner. Therefore, the *Smith* Court stated that the issue to be determined was the validity of the ordinance's elimination of the scienter requirement in light of the possibility that such an elimination could tend to work a substantial restriction on the freedom of speech and of the press. *Id.*, 361 U.S. at 150, 80 S. Ct. at 217. Based on this reasoning, the Court found that it was clear that the Los Angeles ordinance had such a tendency to inhibit constitutionally protected expression that it could not stand under the Constitution. *Id.*, 361 U.S. at 155, 80 S. Ct. at 220.

Unlike *Smith*, the ordinance challenged in the instant case does not have a tendency to inhibit constitutionally protected expression. Minneapolis Code of Ordinances, § 540.410(g)(3) will not prohibit the display of the products within the store, nor will it prohibit the sale of those products. The subsection merely places a minimum restriction on the viewing of merchandise or pictures of the products or entertainment from the sidewalk in front of the store.

Clearly, *New York Times* and *Smith* are distinguishable from the instant case. Subsection (g)(3) does not inhibit constitutionally protected speech, but merely regulates the display of merchandise or pictures of the product or entertainment on the premises. Such a display is commercial speech.

This Court has defined commercial speech as "expression related solely to the economic interest of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561, 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341 (1980). Speech that does no more than propose a commercial transaction is commercial speech. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762, 96 S. Ct. 1817, 1825, 48 L. Ed. 2d 346 (1976). Commercial speech is best understood as speech that merely advertises a product or service for business purposes. *See 44 Liquormart, Inc. v. Rhode Island*, __ U.S. __, __, 116 S. Ct. 1495, 1504, 134 L. Ed. 2d 711(1996) (plurality opinion).

The display of merchandise, which is viewable from outside the storefront, is a marketing enticement to lure people into the store for the ultimate purpose of selling the merchandise. The display is merely an advertisement of the products or services found within the store. Because the display of merchandise merely proposes a commercial transaction, a restriction on the display of merchandise should be reviewed as commercial speech. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762.

Because the display of merchandise or pictures of products or entertainment is commercial speech, Petitioner's overbreadth challenge should fail. The Eighth Circuit properly recognized that the overbreadth doctrine does not apply to commercial speech. *See Central Hudson Gas*, 447 U.S. at 564 n.6 (1980); *See also Garner v. White*, 726 F.2d 1274, 1277 (8th Cir. 1984).

Petitioner argues that, even if some of the regulated speech is commercial speech, the ordinance is still unconstitutionally overbroad because it could be applied to speech that is neither commercial nor sexually oriented. The Eighth Circuit recognized that the Minnesota Court of Appeals found no overbreadth because it determined that the ordinance applied to commercial

speech and sexually oriented speech. *See State v. Holmberg*, 545 N.W. 2d 65 (Minn. Ct. App. 1996), *cert. denied* (May 21, 1996). The *Holmberg* Court concluded, and the Eighth Circuit agreed, that the overbreadth doctrine does not apply to commercial speech and that the regulation of sexually oriented speech was within the legitimate sweep of the adult uses zoning ordinance. *Holmberg*, 545 N.W. 2d at 70.

Petitioner improperly concludes that the Eighth Circuit applied a "narrowing construction" to the ordinance. Petitioner points out that the *Holmberg* court never authoritatively construed the ordinance in a limiting manner. This argument misses the point.

The Eighth Circuit recognized that *Holmberg* did not specifically apply a limiting construction, but stated that

> [t]he court's opinion certainly did not anticipate the ordinance prohibiting displays of materials outside of these two narrow categories of speech [commercial and sexually oriented].

The underlying basis for the Eighth Circuit's decision, and of the *Holmberg* court, is found in the specific language of the ordinance. The display provision applies specifically to "merchandise or pictures of the products or entertainment on the premises." Thus, the ordinance only applies to commercial and sexually oriented speech. The ordinance is *self-limiting*.

No limiting interpretation is needed. The ordinance is not overbroad.

CONCLUSION

For all the foregoing reasons, Respondent City of Minneapolis respectfully requests that the Petition for Writ of Certiorari be denied and that the decision of the United States Court of Appeals for the Eighth Circuit be affirmed.

Respectfully submitted,

LARRY L. WARREN
Counsel of Record
JAY M. HEFFERN
JAMES A. MOORE
CAROLINE M. BACHUN
Attorneys for Respondent
300 Metropolitan Centre
333 South Seventh Street
Minneapolis, Minnesota 55402-2487
(612) 673-2063